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No. 572 10

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CHARLES ELMORE CROPLEY
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United States District Court

WESTERN DISTRICT OF NEW YORK

7-25431
Dep. Ct.

UNITED STATES OF AMERICA,
Plaintiff,
against
SCHINE CHAIN THEATRES, INC., *et al.*,
Defendants.

Civil No. 223
Appeal No. 2

Jurisdictional Statement

(Under Rule 12, Paragraph 1 of the Revised Rules of the Supreme Court of the United States)

This is an appeal from an order of the United States District Court for the Western District of New York entered on July 5, 1946 and designated "Order Setting Forth Plan Effectuating Judgment."

The jurisdiction of the Supreme Court of the United States of the appeal in the above entitled case is based on section 238 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. Section 345, incorporating section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Section 29, as follows:—

Title 28, Section 345: A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise: (1) Section 29 of Title 15. . . .

Title 15, Section 29: In every suit in equity brought in any district court of the United States under Sections 1-7 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie

only to the Supreme Court and must be taken within sixty days from the entry thereof.

The above entitled civil action is a complaint by the United States under section 4 of the Act of Congress of July 2, 1890, 26 Stat. 203, entitled an act to protect trade and commerce against unlawful restraints and monopolies, against nine defendants, alleging violations by them of sections 1 and 2 of said Act.

Said sections 4, 1 and 2 are included within sections 1-7 of the aforesaid title 15.

Judgment was originally entered herein on November 1, 1945. On November 8, 1945, the Court entered a supplementary judgment to suspend the operation of the judgment entered November 1, 1945 until December 7, 1945. On that day the defendants filed a motion in the District Court pursuant to Rule 62(b) and (c) of the Rules of Civil Procedure to stay the execution of or any proceeding to enforce any judgment or decree or order effective or presumably effective herein pending final determination of defendants' motion pursuant to Rule 52(b) *infra*. Said Motion expressly stated that the defendants did not by making the motion admit that any judgment or decree then was or could become effective against them until final determination of their motion under Rule 52(b). At the request of the plaintiff, and with consent of the defendants, the Court postponed the hearing of said motion until February 4, 1946.

On November 8, 1945, on motion and consent of both parties, the Court entered an order extending the time in which any of the parties might move to amend the Court's findings or to make additional findings, or to amend the judgment to December 7, 1945.

On November 10, 1945, the defendants filed a motion pursuant to Rule 52(b) of the Rules of Civil Proceedure, to amend the Court's findings of fact and conclusions of law, to make additional findings and conclusions of law, and to amend the judgment accordingly. This motion sought a reconsideration of certain basic findings of fact and the

alteration of the conclusions of the Court. It was not addressed to mere matters of form, but raised questions of substance.

This motion tolled the time to appeal, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177.

As so decided, the allowance of an appeal before the decision of that motion would have been premature and the sixty days limited by the aforesaid section 29 would not expire, at the earliest, until sixty days after the decision of the aforesaid motion to amend. An application within the sixty days aforesaid is timely and can be allowed effectively either before or after the expiration of the sixty days, *Matton Co.* v. *Murphy*, 319 U. S. 412, 414.

On or about February 1, 1946 the plaintiff filed a motion, pursuant to Rule 52(b) of the Rules of Civil Procedure, to amend the Court's findings of fact and conclusions of law, and the judgment. This motion, together with the defendants' motion under Rule(52), was heard by the Court on February 25, 1946, and on March 11, 1946 the Court filed its opinion and decision granting and denying in part each of said motions.

On March 29, 1946 the Court filed amended findings of fact and conclusions of law as indicated in said opinion and decision, and concurrently therewith the Court filed an amended judgment.

On February 25, 1946, the plaintiff filed its "Plan Of Reorganization of the Schine Circuit Proposed by Plaintiff and Memorandum in Support Thereof". On April 1, 1946, the defendants filed their "Defendants' Objections To Plaintiff's So-called Plan of Reorganization", in which they claimed, among other things, that the consideration of any plan was premature.

On April 16, 1946, the defendants filed their notice of appeal and petition for allowance thereof from the judgment entered on or about the 1st day of November, 1945 and the amended judgment entered on March 29, 1945. Said appeal was duly allowed by order dated April 17, 1946 and the Dis-

trict Court duly issued its citation dated April 17, 1946, returnable within forty days thereafter. The time to docket said appeal and file the record thereof with the Clerk of the United States Supreme Court has been enlarged and extended by orders made pursuant to Paragraph 1, Rule 11 of the Revised Rules of the Supreme Court, until the 30th day of September, 1946.

On April 16, 1946, the defendants moved the court to stay all proceedings under the second and third sentences of Paragraph III of the judgment dated November 1, 1945, on the ground that said sentences had been eliminated from said paragraph by the amended judgment dated March 29, 1946.

On May 28, 1946, the defendants filed "Defendants' Proposals Regarding Re-alignment of the Schine Circuit", expressly reserving all objections theretofore made with respect to the formulation, adoption or approval at any time prior to the determination of their pending appeal in this case by the Supreme Court, of any plan for the dissolution, reorganization or re-alignment of the Circuit. At the same time, to wit, on May 28, 1946, and again reserving all rights to claim that any further order of the District Court with respect to the performance of paragraph III of the amended judgment, prior to the determination of the appeal herein by the Supreme Court of the United States, is premature, the defendants moved the Court for an order decreeing that, prior to the approval or adoption by the Court of any method of compliance with Paragraph III of the amended judgment, hearings be held at which testimony might be taken pertinent and necessary to the method of compliance with Paragraph III of the said judgment, and of plans submitted by the respective parties or any amendments or modifications thereof.

On or about May 31, 1946, the plaintiff filed in the District Court a statement pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court of the United States entitled, "Statement of the United States Opposing Jurisdic-

tion of the Supreme Court and Motion To Dismiss Or Affirm." In said by the said statement the plaintiff claimed that the appeal theretofore taken by the defendants and allowed on April 17, 1946 was premature. Within twenty days thereafter the defendants filed in the office of the Clerk of the Supreme Court of the United States, their "Brief in Opposition to Motion by Appellee to Dismiss or Affirm." Said motion is now pending undetermined.

On June 7, 1946, defendants filed in the District Court a motion for a stay of all proceedings in connection with the consideration, approval or enforcement of any plan or plans of dissolution, reorganization or re-alignment, said stay to continue until the determination by the Supreme Court of the United States of plaintiff's motion to dismiss defendant-appellants' appeal and in the event of the denial by the Supreme Court of said motion, to continue until the final disposition by the Supreme Court of said appeal. Said motion was heard by the District Court on June 17, 1946.

On June 24, 1946, the Court, by separate orders entered on that day, denied defendants' motion to take further testimony and also denied defendants' motion for a stay.

On July 5, 1946, the Court handed down an opinion or decision approving the general features of the plan of divestiture theretofore submitted by the plaintiff and concurrently therewith entered an order purporting to be an "order setting forth plan effectuating judgment." On July 15, 1946 the defendants moved the Court for an order amending and/or resettling and/or clarifying its said order of July 5, 1946 in the following respects:

(a) By expressly stating that the Stay provided for in Paragraph IV of said Order is effective immediately and applies to all parts of said Order, including, without being limited to, the provision for the filing of an election by the Defendants under Paragraph I of said Order, and the provision for the designation by the parties of a person to be appointed as Trustee under Paragraph II of said Order, and

(b) Directing the entry of a formal Judgment in conformity with the terms of said Order, or, in the alternative, designating said Order as a final appealable order, and the defendants, as part of said motion, expressly reserved all claims to jurisdiction previously asserted.

Said motion was heard by the Court on Juy 15, 1946 and the Court thereupon ruled that the stay contained in said order of July 5, 1946 applies to the entire order and that all of said order is now stayed and that the order entered on June 5, 1946 is to be construed as a final order.

This case is within the jurisdictional provisions relied on. (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173).

Appended hereto is a copy of the Opinion of John Knight, U. S. D. J., dated July 5, 1946, and delivered upon the rendering of the order sought to be reviewed and a copy of the opinion of John Knight, U. S. D. J., dated October 8, 1946, and delivered upon the rendering of the original judgment in this case.

Respectfully submitted,

WILLARD S. MCKAY,
Attorney for the Nine Defendants Severally

ARTHUR GARFIELD HAYS,
Of Counsel